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Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

DOMINIC GALEOTA

vs.

UNITED STATES GYPSUM COMPANY,
Petitioner.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals, Second Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of the United States Gypsum Company for a writ of certiorari to review the decision of the United States Circuit Court of Appeals, Second Circuit, rendered December 8, 1941, affirming a judgment in favor of the plaintiff entered in the United States District Court for the Western District of New York on March 26, 1941, which judgment was for $8,305.08 damages and costs, respectfully shows:

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED

This is a common law personal injury action. The plaintiff claimed to have sustained a condition of his lungs known as silicosis, as a result of exposure to alleged harmful dust while working for the defendant in its gypsum

mine and limestone quarry at Oakfield, New York, between November 10, 1930, and February 28, 1931, in the gypsum mine, and in the limestone quarry for six and a half weeks in the spring of 1931, and for one week in the spring of 1933. The judgment of the United States District Court, Western District of New York, was for the plaintiff in the sum of $8,305.08. The decision of the United States Circuit Court of Appeals, Second Circuit, affirmed that judgment.

The matters here involved are:

(1) Whether in a common law negligence action brought by defendant's employee for personal injuries alleged to have been sustained by reason of exposure to harmful dusts present in the place of work, the plaintiff may succeed without establishing as an independent fact that such dusts as may have been present were harmful and injurious to human beings, and were in fact present in such quantities as to produce harm to plaintiff; and

(2) Whether plaintiff is entitled to succeed, he having stated that he knew while working that the conditions under which he worked made him sick.

BASIS OF JURISDICTION

This Court has jurisdiction of this petition by virtue of the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

THE QUESTIONS PRESENTED

The questions here presented are:

(1) Whether the plaintiff was required to and did establish as an independent fact that he was exposed to a harmful and injurious dust in sufficient quantities to have caused harm generally to human beings and particularly to himself; and

(2) Whether the plaintiff was guilty of contributory negligence or assumed the risk of his employment as a matter of law.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The plaintiff failed to offer any evidence showing

(1) The content or nature of the dust present in the place of work;

(2) The amount of such dust present;

(3) That the dust in fact contained a harmful substance or substances; and

(4) That if any harmful substance was present, it was present in sufficient quantity to cause injury to the plaintiff.

The plaintiff was guilty of contributory negligence or assumed the risk of his employment as a matter of law, since he stated that the conditions under which he worked made him sick, and knowing that fact, he still continued to work.

The decision of the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedure, and has sanctioned such departure by the District Court, so as to require an exercise of this Court's power of supervision. To accept the Circuit Court's position is to say that plaintiffs in negligence cases, of which this case is typical, may be relieved of the necessity of establishing the essential elements of their cause of action.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of this Honorable Court directed to United States Circuit Court of Appeals, Second Circuit, commanding such Court to certify and send to the Supreme Court a transcript of the record of the proceedings in said United States Circuit Court of

Appeals, Second Circuit, in the above matter, for its review and determination, pursuant to the provisions of law applicable thereto, to the end that said decision of said Circuit Court of Appeals may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

T. CARL NIXON,
Attorney for the Petitioner.

Dated: January 19, 1942.

SUPREME COURT OF UNITED STATES,

OCTOBER TERM, 1941.

No. .....

DOMINIC GALEOTA

vs.

UNITED STATES GYPSUM COMPANY,
Petitioner.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The decision of the United States Circuit Court of Appeals, Second Circuit, in the above entitled action, has not yet been reported. A copy of that decision is annexed to this brief.

This is a petition for a writ of certiorari to review a decision of the United States Circuit Court of Appeals, Second Circuit, affirming a judgment of the United States District Court, Western District of New York, in favor of the plaintiff in the sum of $8,305.08. The statutory provision sustaining this Court's jurisdiction is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, which provides as follows:

> "Certiorari to Circuit Court of Appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from Circuit Courts of Appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a Circuit Court of Appeals or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after judgment or decree by such lower court, that the cause be

certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal."

The Questions Presented

The questions presented in this brief are:

(1) Whether under the facts hereinafter set forth, the plaintiff was entitled to recover without having established as an independent fact that he was exposed to dusts which were harmful and injurious to him; and

(2) Whether the plaintiff was guilty of contributory negligence or assumed the risk of his employment as a matter of law.

Statement of Case

The plaintiff's proof as to defendant's negligence was limited by the application of the New York State Statute of Limitations (New York Civil Practice Act, Section 49) to a period of three years commencing August 18, 1930. Within this period the plaintiff worked for the defendant in two separate places and for the following periods: In the gypsum mine from November 10, 1930, to February 28, 1931, and in the limestone quarry in the spring of 1931 for a period of six and one-half weeks, and in the spring of 1933 for one week (fols. 623-624, 675-677). Plaintiff had worked for defendant at separate times a total of fifteen years before the commencement of the period involved in this lawsuit.

The defendant's limestone quarry and gypsum mine are located at Oakfield, Genesee County, New York. The quarry is on the surface and is cut into a hillside. It is semicircular in shape, the north side being open. The quarry face is about fifteen feet high, an overburden of earth about ten feet thick having been removed. The face of the quarry is about 250 feet long (fols. 672-674).

While working in the limestone quarry, the plaintiff's job was to break up into pieces small enough for loading onto small cars the rock previously blasted from the face. This work was done either by drilling holes into the pieces of rock with a pneumatic jackhammer so that they could be blasted, or by smashing them with a sledge hammer (fol. 674).

The gypsum mine is seventy-five feet below the surface and in 1930-1931 the workings had extended three miles north and south and five to six miles east and west. The mine is roughly divided into a right, west, and a left, east, sides, the directions in the mine being relative to the right and left of the main haulageway as one faces south from the entrance shaft. The gypsum vein is from three to five feet in thickness and is of uniform quality (fols. 567-602).

The chemical formula for gypsum is $C_aSO_42H_2O$ (fol. 660), and it is No. 2 on the scale of hardness (fol. 707). In some places in the gypsum there appears a formation known as anhydrite, C_aSO_4 (fol. 661). Anhydrite is harder than gypsum but differs from gypsum only in that the water of crystallization is absent. Above the gypsum there is a layer of limestone rock reaching nearly to the surface. The workmen designate this limestone rock as roof rock (fols. 601, 711). In some places the cleavage between the gypsum and limestone is not clean-cut and there is a seam, a few inches in width, containing both gypsum and limestone rock, which locally is called ash rock (fol. 681). The roof rock and ash rock are not drilled or blasted except in exceptional cases, and are not removed from the mine (fols. 567-602).

The mine was developed by pushing forward triple entries off to the left or right of the main haulageway, running north and south. In the first instance these entries are developed simply as rooms, twenty-two feet wide and of the height of the gypsum vein with ten-foot pillars between each room. The gypsum only is removed. Later, the roof of the center entry is taken down for a

width of nine feet, so as to give a clearance from the floor of seven feet. This operation of taking down roof rock is known as brushing. In this cleared entry heavy tracks are laid and overhead wiring installed for an electric motor road. This entry is then called a haulageway. One of the adjacent entries is then made into an air course by building a separating stone wall between it and the haulageway. These walls are called brattices and fill in the open spaces between pillars. They are plastered over on the haulageway side so as to make the air course airtight (fols. 633-650). The east and west entries are developed gradually and in 1930-1931 extended about two miles east and west of the main north and south. As soon as these east and west entries are developed an adequate distance, rooms are turned off them to the north, a terminal distance of 185 feet. The gypsum rock strata dips to the south and the water in the mine naturally flows that way; hence, the gypsum mining is done headed in a northerly direction to prevent the collection of water at the working faces. Exhibit H shows a typical plan of the development. Exhibit E shows the layout of the mine, and on it are indicated the exact spots where the plaintiff worked in the mine during 1930 and 1931 (fols. 590-594).

The mine is so constructed that it can be ventilated by natural air currents, the bottom level of the fresh air intake shaft being lower than the bottom level of the air exit shaft (fol. 701). In addition, the mine is equipped with a forced draft system. Outside air is sucked into the mine by a fan located in a fan house on the surface and over a shaft known as the Farnsworth shaft. This shaft is also used as an emergency escape. The capacity of the fan is 60,000 cu. ft. of air per minute. At the foot of the Farnsworth shaft this air supply is divided and sent east and west of the Farnsworth shaft through air courses to the various places where the men are then working. After the fresh air reaches the working places, it is released and escapes through old workings and leaves the mine through the shaft by which the men

normally enter and leave the mine. The draft in the air exit shaft is always an up-draft. To prevent the fresh air from escaping down a haulageway before it reaches the working places, ventilating doors are hung across the haulageways where necessary. They are hung against the air current (fols. 767-768). The air current and air courses are tested and measured from time to time by using an anemometer (fols. 609-613, 633-639).

During 1930 and 1931, the fan was started in the fan house on the surface at about 7:00 A. M. by Glenn Schultz, an electrician who worked daily in the mine (fol. 884). It was shut off on the surface at 4:00 P. M. by Ira H. Burr, another electrician who worked daily in the mine (fol. 906). There was a switch at the foot of the Farnsworth shaft by which the fan could be shut off but not started. The purpose of this switch was to make it unnecessary for a person ascending this shaft to move against the down-draft of the air supply (fol. 736). The mine was wet and pumps had to be used to control the water (fols. 593, 601, 747, 1029).

During 1930 and 1931, the gypsum mining was done only in the daytime from 7:00 A. M. 4:00 P. M. The blasting was done at the end of each day's work (fol. 765). The downed rock was removed the following day (fols. 765-766). The work of developing haulageways, *i. e.*, brushing, was never done when the gypsum miners were working (fols. 665-666). It was done either at night or, when done during the day, was done on days when gypsum miners were not working in the mine. This division of work was necessary since the brushing operation blocked the haulageways at the point where brushing was being done and prevented the use of the motor track by electric trains loaded with gypsum rock.

During the time affected by this lawsuit, all of the brushing was done by a man named Nielson. Nielson was also the one man who drilled bad roof rock, *i. e.*, dangerous overhead rock, when it was necessary to do so (fols. 652-654, 851, 875).

It was shown by plaintiff that gypsum rock contains 99.7% gypsum and .3% free silica (Exhibit 5); that limestone rock contains 2.4% free silica, 6.5% silicates, 6.5% gypsum and 84.6% carbonates; that ash rock, *i. e.*, the rock between the gypsum seam and the limestone, contains from 2.1% to 3.6% free silica, 36% to 42.1% silicates and 11% to 39% gypsum, the balance being carbonates, *i. e.*, limestone. There was testimony that an average of 66% of the free silica portion of the various samples was under 10 microns in size, that is, of course, after the rock sample had been smashed up (fols. 375-384).

There was no proof offered concerning the actual amount of dust in the mine at any particular time, nor the quantity or size of free silica particles in such dust as may have been present at any given time.

The plaintiff while he worked in the mine was a gypsum miner and whether drilling or loading, he and the rest of his crew were paid by the ton of gypsum rock removed from the mine (fols. 182-183, 189).

Argument

(a) The plaintiff offered no proof to show that he was exposed to a harmful dust, and plaintiff's failure to establish that the dust to which he was exposed was in fact injurious and harmful constituted a fatal omission of proof.

The plaintiff's claim was that while working for the defendant in its underground mine and in its open quarry, he was exposed to clouds of dust. At no time did he offer any evidence to show what was in these clouds of dust. He apparently attempted to supply this necessary information by showing the nature of the rock present in the mine and in the quarry, and stating that the drilling of this rock produced dust.

It was established that the vein of gypsum present in the mine was from 3 to 5 feet in thickness and of uniform

quality; that above the gypsum the rock was limestone and was designated as roof rock; that in some instances, immediately above the limestone the cleavage was not clean-cut and there was a seam, a few inches in width, containing both gypsum and limestone rock, which, locally, was called ash rock.

The plaintiff claimed that all three types of rock were drilled by him or others present while he was working, with the result that great clouds of dust were created, and that sufficient ventilation was not supplied to remove this dust. As far as his work in the quarry was concerned, plaintiff merely stated that he drilled the limestone rock there present, and that such drilling produced dust; that others besides himself drilled in his presence.

The proof with relation to the content of the rock before drilling was as follows: That the gypsum rock contained 99.7% gypsum and .3% free silica; that limestone rock contained 2.4% free silica, 6.5% silicates, 6.5% gypsum, and 84% carbonates; that the ash rock, *i. e.*, the rock between the gypsum seam and limestone, contained from 2.1% to 3.6% free silica and 36% to 42.1% silicates and 11% to 39% gypsum, the balance being carbonates. The only proof as to the harmful quality of the materials found in the rock was (1) that gypsum dust was not harmful, and (2) that free silica dust would be harmful if particles of 10 microns or less in size were breathed. There was no proof as to the harmful quality, if any, of silicates or carbonates. Presumptively, the dust of these materials is not harmful.

It should be noted that (1) there was absolutely no proof in this case that silica dust was in fact present in the atmosphere, even though there was proof that there was some possibility of rock containing as high as 3.6% of free silica being drilled; and (2) there was absolutely no proof as to the amount of free silica which would have to be present in any atmosphere to make the breathing of such atmosphere in fact harmful. It is claimed by the petitioner that the failure of the Circuit Court of Ap-

peals to give due regard to this omission in plaintiff's proof constitutes the basis for a reversal of its decision.

The mere presence of free silica in the rock present in the mine (there was no proof that there was any free silica present in the quarry rock), or for that matter in such dust as may have been present in the air, is not proof that the plaintiff was exposed to an exposure capable of producing harm. This principle is clearly illustrated by the provisions of New York State Industrial Bulletin, No. 33, effective May 1, 1937, which makes a distinction between non-dangerous and dangerous concentrations of silica dust. Section 33-2.3 of this bulletin provides:

> " 'Injurious silica dust concentration' shall mean dust produced from drilling silica-bearing rock which is in excess of the following values as determined by an approved dust count method.
>
> Class I. One hundred million (100,000,000) particles per cubic foot of air, as specified in Rule 33-2.2.
>
> Class II. Ten million (10,000,000) particles per cubic foot of air, as specified in Rule 33-2.2."

Rule 33-2.2, reads:

> " 'Silica-bearing rock' means any rock formation, natural or synthetic, containing as a component part, free silicon dioxide.
>
> 'Silica-bearing rock' shall be divided into two classes:
>
> Class I. Any rock formation of substantially uniform geological character having free silicon dioxide as a component part which is known from geological studies or otherwise can be shown by the applicant to the satisfaction of the Industrial Commissioner, to run uniformly less than ten (10) per cent by weight, of the rock formation.
>
> Class II. All rock formations having free silicon dioxide as a component part, ten (10)

> per cent or more by weight, and all other formation, natural and synthetic, having a variable and unpredictable content of free silicon dioxide."

These quotations from Bulletin No. 33 are used to illustrate the fact that the actual content and the concentration are essential factors in determining whether or not a dust concentration is injurious.

The report of the National Silicosis Conference, dated February 3, 1937, reported in United States Department of Labor Bulletin No. 3, 1937, also makes the distinction between non-dangerous silica exposures and dangerous exposures. On page 14 of the report this statement is found:

> "There is evidence that for prolonged exposure a concentration of more than 5,000,000 particles per cubic foot of highly siliceous dust is dangerous. Therefore, it is now considered good practice to hold concentrations of highly siliceous dust at 5,000,000 particles per cubic foot or less."

On page 29 we find:

> "The properties of dust which may determine its capacity to produce damage have been shown to be its composition, the quantity suspended in the industrial atmosphere and its particle size. The determination of the concentration and character of industrial dusts permit evaluation of the extent of the dust hazard, and also serve as a criterion of the efficiency of the devices which have been developed for the control of the hazard."

The fact that two of plaintiff's medical witnesses were willing to state that plaintiff had sustained a condition known as silicosis, in response to a hypothetical question which merely contained a statement that dust was present and that the rock from which the dust presumably came contained the percentages of silica shown above, does not supply the missing proof nor make its establishment unnecessary. It should be noted that the hypotheti-

cal question did not show the actual quantity of dust present, nor the character of that dust; and, even more important, if one is to do as the Circuit Court suggests, assume that silica dust must have been present if silica-bearing rock was drilled, there was no proof as to how much or how little of silica-bearing rock was drilled. It is obvious that the great percentage of the rock drilled was gypsum rock, which contained only .3% of free silica.

The necessity for plaintiff's establishing the harmful quality of such dust as may have been present, is not only apparent from the standpoint of establishment of a negligent condition but also from the standpoint of establishment of the fact that plaintiff sustained silicosis, because in this case the testimony that plaintiff had silicosis was based upon the assumption that he was exposed to and did inhale silica dust.

The cases cited by the Circuit Court of Appeals on this issue are without any probative force, since the question of the harmful character of the dust to which the plaintiffs in the cited cases were exposed, was not, and in fact could not have been raised. The dust alleged to have been present in the cited cases was sand dust, *i. e.*, silica dust, because the material producing the dust was itself sand, *i. e.*, silica. Here, that situation does not exist.

(b) The plaintiff was guilty of contributory negligence or assumption of risk as a matter of law, and his affirmative conduct defeated his right to recovery.

In a case of this kind it is unnecessary to make any distinction, if there is in fact any real distinction, between contributory negligence and assumption of risk.

Schlemmer v. Buffalo, 205 U. S. 1, 12.

While it is true, generally speaking, whether or not contributory negligence or assumption of risk will defeat a recovery, is a question of fact for a jury, in the instant case there was no question of fact on this issue.

The sole proof was that the plaintiff continued in his place of employment under conditions which he knew caused him to become sick and unable to work (fols. 153, 154, 155, 265, 266, 267, 283). The very proof by which he sought to establish that defendant was guilty of negligence, established his own contributory negligence or assumption of the obvious risk. The jury could not reject this testimony. It could not absolve him from the results of his own affirmative act. Contributory negligence or assumption of risk is a legal bar in cases of this kind.

Barrencotto v. Cocker Saw Co., 266 N. Y. 139, 143.
Sweeney v. Berlin & Jones Envelope Co., 101 N. Y. 520, 524.
Cornell v. J. J. Newberry Co., 250 N. Y. App. Div. 816.
C. O. & G. R. Co. v. McDade, 191 U. S. 64, 67, 68.
Berry v. Atlantic White Lead Co., 30 N. Y. App. Div. 205.
Wager v. White Star Candy Co., 217 N. Y. App. Div. 316.
Dowd v. N. Y., O. & W. Ry. Co., 170 N. Y. 459, 468, 469.

The statement of the Circuit Court in its decision that the defendant was precluded from successfully maintaining the defense of assumption of risk, overlooked the established fact that the risk here, if any, was open and obvious and the plaintiff knew all about it and knew the conditions under which he worked were harmful to him.

Conclusion

It is, therefore, submitted that the plaintiff failed to establish an absolutely essential element of his case, *i. e.*, to prove independently of any other fact, that the dust which he claimed he was obliged to breathe, was in fact, harmful, and, therefore, a cause of action was never made out against the defendant, your petitioner.

It is also submitted that plaintiff's contributory negligence or assumption of the obvious risk of his employment, was established as a matter of law, and such contributory negligence or assumption of risk was a complete bar to his recovery.

The questions here presented are fundamental in this case and are also present in numerous other cases of like nature pending in the United States District Court, Western District of New York, and, therefore, a careful consideration of them by this Court is warranted, and this Court should review the decision of the United States Circuit Court of Appeals in order that its decision may be reversed.

Dated, January 19, 1942.

Respectfully submitted,

T. CARL NIXON,
Attorney for the Petitioner.

Annex to Brief

Opinion of Circuit Court of Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 112—October Term, 1941.

(Argued November 13, 1941. Decided December 8, 1941.)

DOMINIC GALEOTA,
Plaintiff-Appellee,

against

UNITED STATES GYPSUM COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of New York.

From a judgment that the plaintiff recover $8,305.08 against the defendant in an action for injuries arising from the defendant's negligence, the latter appeals. Affirmed.

Before: Swan, Augustus N. Hand and Chase,
Circuit Judges.

Goodwin, Nixon, Hargrave, Middleton & Devans, Attorneys for Defendant-Appellant; W. Clyde O'Brien and Wendell J. Brown, Counsel.

William L. Clay, Attorney and Counsel for Plaintiff-Appellee.

AUGUSTUS N. HAND, Circuit Judge:

The plaintiff Galeota, an employee of the defendant, United States Gypsum Company, brought this action to recover damages for injuries he claims to have suffered because the defendant neglected to provide him with a safe place to work, or to furnish him with devices that would prevent him from inhaling particles of silica from which he contracted silicosis. He sought to recover for negligence of the defendant in failing to observe its common law obligations and also in failing to observe certain provisions of the Labor Law of the State of New York.

Section 200 of the Labor Law of the State provides:

> "General duty to protect health and safety of employees.—All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein. The Board shall make rules to carry into effect the provisions of this section."

Section 417 of the Labor Law provides:

> "Ventilation.—An air current sufficient to remove smoke and noxious gases and to insure the safety of every employee, shall be conducted along every passage-way and working place."

Rule 557 of State Industrial Bulletin No. 12 reads as follows:

> "In any industry, trade or occupation or process involving the creation of silica dust, there shall be provided means for removing such dust at the point of origin or preventing same from being disseminated in the air breathed by employees in so far as it is practicable to do so."

The defendant evidently supposes that we are in a position to weigh the evidence and to reverse a judgment founded on a verdict against the weight of credible proof, but such is not the case in the United States Courts. We may only upset a verdict for failure of

proof where the verdict is without substantial evidence to support it, as was not, in our opinion, the situation here.

The plaintiff's expert Jerome Cowan testified that: "Silicosis is a disease caused by the inhalation of silica or sand particles and is characterized by an absence of fever and decreased ability to work, and an increased susceptibility to tuberculosis, and certain characteristic X-ray changes." Cowan also testified that "the disease is incurable because of the chemical destruction of the lung tissue."

The plaintiff's proof of the defendant's negligence was limited by the New York Statute of Limitations (Civil Practice Act, Section 49) to a period of three years prior to the bringing of this action on August 18, 1933. In order to prevail, the plaintiff must show (1) that he had a condition of his lungs known as silicosis, and (2) that the condition was caused in whole or in part by negligence of the defendant occurring during the six months when he worked for the defendant in the years 1930, 1931 and 1933.

The plaintiff received a judgment for $8,305.08 in the court below from which the defendant now appeals. We hold that there was testimony from which the jury might lawfully find that the plaintiff contracted silicosis and that the disease was due to the defendant's negligence during the six months mentioned. Accordingly the judgment should be affirmed.

The plaintiff testified that he first became dizzy and had sick spells during his employment and had to lay off work in 1930; that after going back to work he felt sick at night, coughed and had difficulty in breathing, felt a burning in his chest "like needles" and had to stop and rest. He added that his condition thereafter got worse. This his physicians attributed to silica particles which he had inhaled while working as a driller for the defendant. There was evidence that he worked in the defendant's gypsum mine at Oakfield, Genesee County,

New York, from November 10, 1930, to February 28, 1931, and in its limestone quarry for about six and one-half weeks in 1931, and five days in 1933.

While working in the gypsum mine he used an electric drill on the soft gypsum and a jackhammer, operated by air pressure on the harder rock. In the gypsum mine there was a layer of limestone rock above the vein of gypsum sometimes known as roof or fire rock. In some places there was between the vein of gypsum and the roof rock a layer containing a mixture of limestone and gypsum called ash rock. The mine was developed by pushing forward entries or rooms to the left and right of the main passage. After extracting the vein of gypsum the roof of each entry is taken down for a width of nine feet so as to give clearance from the floor of seven feet and in this cleared entry to lay tracks and install overhead wiring for an electric motor road to make a haulageway for the removal of the gypsum. The plaintiff testified that he used an electric drill in working on the gypsum and a pneumatic jackhammer in dislodging roof and ask rock. The mine was so constructed that it could be ventilated by natural air currents and was equipped with a forced draft system whereby outside air was sucked into the mine by a fan located in a fan-house above ground.

The proof indicated that the gypsum rock contained only .3% of free silica, the limestock rock 2.4% free silica and 6.5% silicates, and the ash rock from 2.1 to 3.6% of the free silica and 36% of silicates. There also was testimony that an average of 66% of the free silica portion of the various samples was under 10 microns in size.

As we have said, the plaintiff's evidence indicated that when working in the mine he used an electric drill to remove the gypsum and a jackhammer to dislodge ash rock and roof rock. In each case dust was created. When using the jackhammer he said the dust was so thick that it looked like flour or smoke and a man could not be seen who was but three or four feet away. He testified that the places where he worked were sometimes so far from

the fan that the condition of the air was bad and he got no ventilation. Moreover both he and some of his witnesses said that the fan was shut off at ten or half-past ten o'clock in the morning so that during most of the working day it did not give the ventilation that should have been furnished. Likewise it ordinarily was not operated at night so that the day did not begin with a well-ventilated mine. In addition to this, the jackhammers were not equipped with dust traps and when they were used to clean out holes that were being drilled the dust would come back into the places where men were working. No masks or respirators were furnished to the drillers.

When working in the limestone quarry the plaintiff used a jackhammer to bore holes in rock previously blasted so that it could be broken up for loading. In doing this it was necessary to bend over and lean on the drill, with the result that his mouth was only about two and one-half feet away from the drill hole. There would be dust in the hole which necessarily would be forced out by the drill and come all over the driller. The jackhammer had no dust trap to catch the dust, there was no suction device to suck it away and no mask or respirator for the workmen. The plaintiff said that four or five other drillers would be working at the same time as himself.

The defendant introduced evidence contradicting much of the plaintiff's proof. It was to the effect that drilling with a jackhammer was not done by the plaintiff, that the fan was operated at all times during working hours and that the places where he worked were properly ventilated and free from silica dust. In our opinion, these issues were for the jury and must be regarded as settled in plaintiff's favor by the verdict.

The defendant attacks the verdict mainly on the ground that there was no proof of the amount of free silica present in any dust which the plaintiff inhaled. In other words, it is argued that the plaintiff did not support the burden of showing how much silica was in the air he breathed and whether it was dangerous in amount. But

Dr. Cowan testified that there was an increased fibrosis shown in the X-ray photographs of the plaintiff's lungs, that their condition was abnormal and diseased, and in answer to a hypothetical question based on the plaintiff's evidence, said that the latter was suffering from silicosis produced by exposure to the conditions we have mentioned. The testimony of Dr. Laidlaw and Dr. Popoff was to the same effect. The testimony was, we think, sufficient to go to the jury and to justify the verdict for the plaintiff however we might have resolved the issues were we the fact finding body. There was proof that he was drilling in formations which contained substantial amounts of silica from which dust was created and not carried off, and there was also proof that a disease resulted having all the characteristics of silicosis. This was enough for submission to a jury of the cause of the disease. Its verdict concludes us. *Pieczonka v. Pullman Co.*, 102 F. (2d) 432 (C. C. A. 2); *Jacque v. Locke Insulator Corp.*, 70 F. (2d) 680 (C. C. A. 2); *Downing v. Oxweld Acetylene Co.*, 169 Atl. 709 (N. J.); *Bellows v. Merchants Despatch Trans. Co.*, 257 App. Div. 15, aff. 283 N. Y. 591.

The defendant contends that the plaintiff was barred from recovery by his own contributory negligence and by his assumption of risks inherent in his employment. There was nothing to show that the defendant instructed this employee that inhaling the dust would result in serious danger to him. This was its duty to a day laborer of no apparent education. *Jacque v. Locke Insulator Corp.*, 70 F. (2d) 680, 683. According to the plaintiff's witnesses there likewise was no showing that defendant furnished him with proper appliances to avoid exposure of silica dust or with a safe place to work. Neglect to perform these obligations precluded it from successfully maintaining the defense of assumption of risk. *Gustav Pantzar v. Tilly Foster Iron Mining Co.*, 99 N. Y. 368; *Dana, Adm., v. N. Y. Cent. & H. R. R.*, 92 N. Y. 639. Whether the defendant was guilty of contributory negligence in continuing to work after the dust had once made him sick was a question for the jury. *Bellows v. Mer-*

chants Despatch Trans. Co., 257 App. Div. 15, aff. 283 N. Y. 591. The plaintiff denied that he knew that the dust was dangerous or that his disabilities were due to inhaling it (Record, pp. 52, 75 and 76).

The trial court committed no error in admitting Rule 557 of State Industrial Bulletin No. 12. The rule became effective January 1, 1931, but the plaintiff was employed long after that date. The rule on its face was designed to provide safeguards against silica dust and was plainly applicable to just such a situation as the present. *Schmidt v. Merchants Despatch Trans. Co.,* 270 N. Y. 287.

It is contended that there was error in excluding proof offered by the defendant to show the cost per day of electricity necessary to operate the ventilator fan. Possibly this should have been admitted as indicating that the cost would have been so trifling as to render plaintiff's testimony that the fan was turned off every day at 10 A. M. improbable, at least as a business economy. But the evidential value of the proof was slight and its relation to the issue as to whether the fan operated during working hours so remote that we cannot regard its exclusion as substantially prejudicial.

Judgment affirmed.

Supreme Court of the United States

October Term, 1941.

No. 893.

DOMINIC GALEOTA,

vs.

UNITED STATES OF AMERICA.

Brief of Respondent in Opposition on Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

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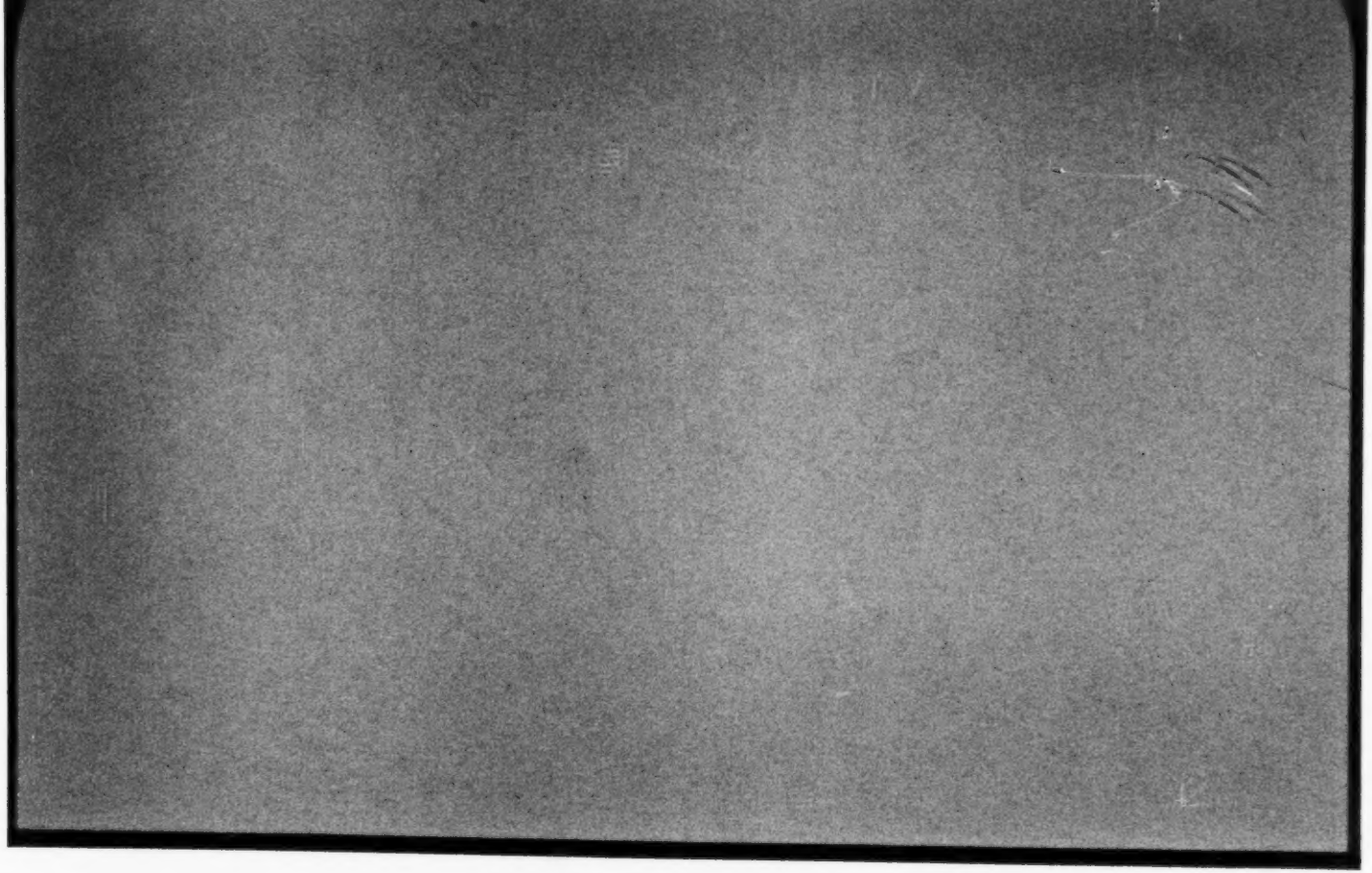

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 893.

DOMINIC GALEOTA

vs.

UNITED STATES GYPSUM COMPANY,
Petitioner.

Brief of Respondent in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The decision of the United States Circuit Court of Appeals, Second Circuit, in this action is reported at 123 Fed. Rep. 2nd 947.

Dominic Galeota for his brief in opposition to the petition of a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled action affirming the judgment of the United States District Court for the Western District of New York respectfully shows:

That the decision herein by the Circuit Court of Appeals for the Second Circuit is not in conflict with the decision of any other Circuit Court of Appeals in the same matters raised.

That the Circuit Court of Appeals for the Second Circuit in its decision herein has not decided any important question of local law in conflict with the applicable local decisions.

That there is no important question of Federal Law which has not been hitherto decided that should be settled by this Court.

That the decision of the Circuit Court of Appeals for the Second Circuit herein is not in conflict with applicable decisions of this Court.

That the Circuit Court of Appeals for the Second Circuit in its decision herein has not departed from the accepted and usual course of judicial proceedings nor has it sanctioned such a departure, thus there is no reason for this Court to exercise its power of supervision.

Statement of the Case.

This is an out and out negligence action brought by the plaintiff to recover damages for personal injuries sustained by him as a result of his employment by the defendant. The plaintiff established that he sustained injuries to his lungs by reason of having suffered a condition of the lungs known as pneumonoconiosis, fibrosis and silicosis, and that these injuries which are permanent, resulted from the conditions under which he worked while employed by the defendant because the defendant did not provide and maintain a reasonably safe place in which the plaintiff performed his work and that the defendant did not meet the requirements of the Labor Law of the State of New York.

The question of the defendant's negligence is not raised by the petitioner and in any event the issues of negligence, contributory negligence, and assumption of risk

were resolved in favor of the plaintiff, by the jury, under a proper charge of the Court under the law obtaining in cases of this nature.

Bellows vs. Merchants Despatch Transportation Co., 257 A. D. 15, aff. 283 N. Y. 591.

The Circuit Court of Appeals has reviewed the testimony regarding these items and affirmed the judgment.

May we point out at the outset that the defendant in an action of this nature at the October, 1934, Term, applied to this Honorable Court for a writ which was denied.

Jacque v. Locke Insulator Corp., 70 Fed. 2nd 680. Certiorari denied, 55 S. Ct. 99, 293 U. S. 585.

In that case the defendant had appealed from a judgment of Fifteen thousand two hundred thirty-nine dollars and fifty-six cents ($15,239.56) including interest, which judgment in favor of the plaintiff was rendered by jury in the Federal Court for the Western District of New York and which judgment was affirmed by the Circuit Court of Appeals for the Second Circuit and although reasons similar to the reasons now urged before the Court were there presented yet this Court refused the writ. This case like that one is a simple negligence action and involves no unusual questions either with reference to the law or with reference to the facts, and in view of the fact that this Court has previously denied a writ in a similar action, there is no reason to satisfy counsel's desire that the time of the Supreme Court of the United States be taken up with its review or in reading an extensive brief.

For a long period of time the plaintiff worked for the defendant as a driller in its mine and in the latter part of his employment from November 10, 1930, he worked in that portion of the mine known as 16 right and 15

left. In the spring of 1931 he worked drilling and blasting rock in the limestone quarry of the defendant and in the spring of 1933 for an additional period. The rooms off the haulageways in the mine were only 3 or 3 1/2 feet in height (p. 38) (Exhibit 1). The plaintiff used both an electric drill (Exhibit 3) and a jackhammer (Exhibit 3) (pp. 36, 37). His work was primarily to drill holes in the gypsum and rock so that charges of dynamite could be placed therein and the rock and gypsum blasted. It was necessary for him to use a jackhammer to drill the hard rock which was known as fire rock and *when this operation was carried on the dust was so thick that it looked like flour and this dust stayed in the atmosphere of the mine practically all day* (p. 42). *There was no dust trap on the jackhammer nor was there any hood or suction devices in these rooms to take away the dust nor was the plaintiff furnished any mask or respirator* (p. 43). When using the jackhammer, which he did sometimes 6 or 7 hours a day, it was necessary for him to stand within 2 1/2 to 3 feet from the rock (p. 46).

There was but one fan in this mine for the purpose of bringing in the air and that was located 2 or 3 miles from some places in which the plaintiff worked and when he worked this far from the fan the *air was bad and the ventilation poor and little of the smoke was removed* (pp. 150, 151). At times 4 or 5 others would be using a jackhammer at the same time and of course when this was done dust in the form of fog or clouds was created and remained in the atmosphere (pp. 56, 91). When drilling was done by the electric drill dust was created especially when the top hole was drilled and this *dust was so thick you could only see a man about 15 or 25 feet away* (p. 42).

During his work in the quarry he also used a jackhammer and this work necessitated his face being only about 2 to 2 1/2 feet away from the rock wall (p. 55). The only fan that was located in this mine was started *in the morning* at about 7 o'clock and was shut off at about 10:00 or 10:30 in the morning and yet this plaintiff was forced to work without any means being utilized to bring fresh air in this mine, thus causing him to feel weak and sick because he couldn't get fresh air. *The plaintiff did not know this dust was injurious to breathe and did not know the chemical composition of the rock nor did anyone inform him that this dust was injurious* (pp. 75, 76).

Whatever doors the defendant maintained in its mine across the haulageway for the purpose of keeping the air in the portion of the mine in which the men were working was permitted to remain open at various times thus allowing the air to escape rendering the doors of little effect (p. 352).

Pursuant to an order of the District Court, samples of the rock from the portions of the mine in which the plaintiff worked were taken and a chemical analysis made which revealed that these samples of rock, which of course had been subjected to the drilling processes and from which dust was created, as we have previously outlined, contained free silica ranging from 3/10% to 3.6% and the fineness of these particles ranging from 61% to 82% under 10 microns (breathable size) (pp. 125, 128).

The lay witnesses called by the plaintiff numbering four, clearly substantiated the testimony given by the plaintiff with reference to the conditions under which he worked daily in this defendant's mine.

Four physicians were called by the plaintiff to testify as to his injuries and as to the cause of these injuries. All *three of the medical experts called on the direct case testified that the plaintiff was suffering from a permanent injury or disease known as pneumonoconiosis or silicosis, which was caused by the plaintiff's inhalation of the dust created in the defendant's operation of its mine and quarry.* The facts established with reference to the working conditions were propounded to the experts in the form of hypothetical questions.

The verdict arrived at by the jury was fully justified both upon the basis of negligence and the medical proof. This evidence presented pure questions of fact and no unusual circumstances presented which would call for or justify intervention by the Supreme Court of the United States.

There are no errors in the record justifying a review by this Court. After a careful examination of the evidence and the circumstances surrounding the conduct of the trial this verdict in favor of the plaintiff has been sustained by the United States Circuit Court of Appeals for the Second Circuit unanimously, in a learned opinion by Justice Augustus N. Hand.

Questions Presented.

As previously pointed out the questions raised here are not unusual and are limited.

The questions raised by the petitioner are only two.

(1) Whether under the facts as herein stated the plaintiff established by a fair preponderance of the evidence that the conditions under which the plaintiff worked caused his injury.

(2) Whether or not the plaintiff was guilty of contributory negligence or assumed the risk of his employment as a matter of law.

ARGUMENT.

(A) The plaintiff established by a fair preponderance of the evidence that the conditions under which he worked caused his injury.

The plaintiff established from the analysis of the rock taken from the defendant's mine and the portions thereof where the plaintiff worked that this rock contained free silica ranging up to 3.6% and that during the entire working day there was present in the atmosphere of the workrooms in this mine clouds of dust.

Section 200 of the Labor Law of the State of New York provides:

> "General duty to protect health and safety of employees.—All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein. The board shall make rules to carry into effect the provisions of this section."

Section 417 of the Labor Law of the State of New York relating to mines, provides:

> "VENTILATION.—An air current sufficient to remove smoke and noxious gases and to insure the safety of every employee *shall be conducted along every passageway and working place.*"

As previously pointed out the drilling which this plaintiff did with both the electric drills and jackhammers created large quantities of dust and *this dust came from*

the rock containing the free silica. This without any stretch of imagination conclusively shows that the dust in this atmosphere caused from drilling the rock contained free silica and the concentration of this dust was described by all of the witnesses as being in the form of a cloud or fog.

Sections 33-2.3 and 33-2.21 of the Rules of the New York State Industrial Board as contained in Bulletin No. 33 set forth by the petitioner on pages 12 and 13 of the brief deals merely with outside drilling, and in no way applies to the plaintiff's employment in the mine and were not in force during plaintiff's employment and not adopted until some years thereafter. The concentration of this dust must have been high because there was a cloud of this dust in the atmosphere during the entire working day.

The plaintiff's medical witnesses stated with no uncertainty in response to questions embracing the evidence of the case as to the chemical analysis of the rock and the clouds of dust in the atmosphere that the plaintiff's condition was caused from the inhalation of this dust while working for the defendant.

The petitioner attempts to set a standard that would make it impossible for any plaintiff in an action of this nature to recover by saying in effect that before a recovery can be had in a case of this nature a dust count should be taken in a mine that has not been worked for a period of three or four years at the time the injuries were discovered and an analysis made of the dust. This would be tantamount to precluding recovery in actions of this nature regardless of the merits of the action.

These expert medical witnesses called by the plaintiff were satisfied from their expert knowledge relative to the effect of the inhalation of dust on the human lung,

that *the dust breathed by the plaintiff unquestionably caused his injury.*

It is well settled law that an expert may be permitted to state facts known to him because of expert knowledge though involving elements of inference.

Cropper vs. Titanium Pigment Co., Inc., 47 Fed. Rep. 2nd 1038.

In the case of

Jacque vs. Lock Insulator Corp. (*supra*),

in which case this Court denied a writ of certiorari it was held that the establishment of the fact that the plaintiff breathed clouds of dust and that certain materials containing free silica were used although no dust count or analysis of dust in the atmosphere was made or considered by the expert medical witnesses that was sufficient to establish the casual relationship between the employment and the injury.

The Court of Appeals of this State in the case of

Bellows vs. Merchants Despatch Transportation Co. (*supra*),

likewise held this sufficient.

This Court of Appeals case settled the law in this regard in the State of New York holding that this evidence was sufficient to establish the fact that the plaintiff's employment caused the injury and under the ruling of this Court in the case of

Erie R. Co. vs. Tompkins, 58 S. Ct. Rep. 817; 304 U. S. 64,

the Circuit Court is bound by that decision.

This rule is followed not only by this Court and by the Courts of the State of New York, but elsewhere throughout the nation and it has been uniformly held

by the Appellate Courts of various jurisdictions in refusing to set aside a verdict in favor of the plaintiff in actions of this nature that it was sufficient to establish the causal relationship between the injury and employment by showing that there were clouds of dust present in the atmosphere and by showing the kind of materials used in the operations and even in some cases no chemical analysis whatsoever was made as in this case, and the Courts have never gone so far as to hold that the plaintiff must establish as a separate fact that he was exposed to dusts which were harmful and injurious to him other than as here clearly established.

See:

Langeneckert vs. St. Louis Sulphur & Chemical Co., 65 S. W. Rep. 2nd 684.
Evans vs. Chevrolet Motor Co., 105 S. W. Rep. 2nd 108.
Cleveland vs. Laclede Christy Clay Products Co., 113 S. W. 2nd 1065.

However in this case the medical expert witnesses established by their testimony that the dust which the plaintiff breathed was harmful and injurious to him because they stated that the inhalation of this dust caused his injury.

The Supreme Court in New Jersey in upholding a verdict for the plaintiff in an action of this nature in the case of

Downing vs. Oxweld Acetylene Co., 169 Atl. 709,

held that where the agency is present regardless of the amount and there is evidence showing that the man contracted disease as a result of an agency of that nature, it is not necessary for the plaintiff to establish the concentration of the agency in the atmosphere. We respectfully call this Honorable Court's attention to the opinion

delivered by the Justice of the Court at pages 710 and 711.

The Circuit Court of Appeals for this Circuit has previously passed upon many of these questions in an action of this nature.

See:

Pieczonka vs. Pullman Co., 102 Fed. Rep. 2nd 132.

It is interesting to note that the petitioner cites no authority under this point to substantiate his contention.

(B) The plaintiff was not guilty of contributory negligence or assumption of risk as a matter of law, these being purely jury questions which were resolved by it in favor of the plaintiff.

The question of the plaintiff's contributory negligence or assumption of risk was submitted to the jury under proper charge of the Court to which charge the attorney for the defendant took no exception and made no requests to charge.

The Court specifically pointed out to the jury that the law required the plaintiff to exercise reasonable care and caution and that if he knew this dust which he was inhaling from time to time was affecting his lungs and continued to work there with that knowledge, that they should consider this in determining whether or not the plaintiff had used reasonable care and caution to protect himself (pp. 386, 387).

The plaintiff testified that he did not know the chemical composition of this rock and that no one connected with the defendant or anyone else ever told him that this dust was bad to breathe (pp. 75, 76).

Apparently the defendant takes a position that since the plaintiff testified that he began to cough before he left the defendant's employ and that when the fan was turned off he felt sick and couldn't get much air that these facts constituted assumption of risk as a matter of law. This is not true and the defendant in the case of

Bellows vs. Merchants Despatch Transportation Co. (*supra*)

urged before the Court of Appeals as here that the plaintiff assumed the risk because he had in substance testified that the dust created, choked him and affected him, yet the Court of Appeals unanimously sustained the verdict in favor of the plaintiff.

It is well settled law in the State of New York that an employee assumes only those risks that are obvious and known to him.

Jacque vs. Locke Insulator Corp. (*supra*).

Furthermore it is the province of the jury in cases of this kind to determine whether or not a plaintiff has been guilty of contributory negligence or has assumed the risk of his employment.

Brancoleone vs. Northern Stevedoring Co., Inc., 224 A. D. 562; 231 N. Y. S. 489.
Smith vs. Wesel Manufacturing Co., 102 Fed. Rep. 2nd 132.
Krushoer vs. Miller, 237 A. D. 518; 262 N. Y. S. 294.
Boyle vs. Degnon-McLeon Construction Co., 47 A. D. 311; 61 N. Y. S. 1043.
Mehan, Admx. vs. The Syracuse, Binghamton and N. Y. C. R. R. Co., 73 N. Y. 585.
Codigan vs. Glens Falls G. and E. Co., 112 A. D. 751; 98 N. Y. S. 954.
General Lighterage Co. vs. Hansen, 228 Fed. 497.
Mautsewich vs. U. S. Gypsum Co., 164 A. D. 902, 217 N. Y. 593.
Welch vs. Waterbury, 159 A. D. 509; 217 N. Y. 604.

We can go further than this and now say that it is undoubtedly the law that since the jury found that the defendant had been negligent in the operation of its mine and quarry and had failed to discharge its duty toward the plaintiff, that the plaintiff could not be guilty of contributory negligence or assume the risk of his employment, under its rule laid down both by the Court of Appeals of the State of New York and by this Court in a long line of case law.

An employee does not assume the risk of his employment until after the master has discharged his duty of reasonable care to prevent such risk and he does not assume the peril arising from the negligence of the master, by the master's violation of a duty placed upon it by statute.

See:

Dana, Admx., vs. N. Y. S. & Hudson River R. R. Co., 92 N. Y. 639.
Pantzar vs. Tilly Foster Iron Mining Co., 102 Fed. Rep. 2nd 132.
Martin vs. Picher Lead Co., 21 Fed. Sup. 142.
Kreigh vs. Westinghouse & Co., 214 U. S. 249; 29 Supreme Court Rep. 619.

Mr. Justice Day in the *Kreigh* case said:

> "The duty of the master to use reasonable diligence in providing a safe place for the men in his employ to work in and to carry on the business of the master for which they are engaged has been so frequently applied in this court, and is now so thoroughly settled, as to require but little reference to the cases in which doctrine has been declared * * *. *The employee is not obliged to examine into the employers' methods of transacting his business, and he my assume that reasonable care will be used in furnishing appliances necessary to carry on the business* * * *.*
>
> *Nevertheless, the duty of providing a reasonably*

safe place for the carrying on the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character * * *.

There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer" (Italics ours.)

Here the master had not discharged its duty and the plaintiff is not charged with contributory negligence or with assuming the risk of his employment and in any event it was purely a jury question which was submitted to them under a proper charge of the Court.

Conclusion.

It is therefore submitted that the plaintiff clearly established by a fair preponderance of the credible evidence that he suffered injury due to the conditions under which he worked, and that his injury was a result of the *inhalation of dust containing silica, which he was compelled to breathe because of the defendant's negligence.*

It is also submitted that the question of the plaintiff's contributory negligence or assumption of risk were questions which were rightfully determined by the jury in his favor and that any risk attendant to his employment were not obvious to him and were unknown, and since the master failed to discharge its duty the defenses raised by them must fall.

The questions raised by the petitioner are questions that have again and again been determined by the Federal Courts and the Courts of the State of New York, and there is nothing raised on this petition that warrants the consideration of this Court.

WILLIAM L. CLAY,
Attorney for Respondent.

Dated, February 7, 1942.